No. 73-1210

In the Supreme Court of the United States

OCTOBER TERM, 1973

INTERSTATE COMMERCE COMMISSION,
Appellant,

v.

OREGON PACIFIC INDUSTRIES, INC., ARTHUR A. POZZI CO., TIMBERLAND LUMBER CO., CHAPMAN LUMBER CO., NORTH PACIFIC LUMBER CO., and AMERICAN INTERNATIONAL LUMBER CO.,
Appellees.

MOTIONS TO AFFIRM AND ARGUMENT

On Appeal from the United States District Court for the District of Oregon

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Come now the appellees in the above entitled action and move this Court for an Order affirming the Judgment of the court below pursuant to Rule 16(c) and Rule 16(d) of the Rules of this Court on the following grounds:

MOTION I

There is no substantial reason why this Court should hear arguments on the merits.

ARGUMENT

The issue in this case is not whether the appellant has the power under *appropriate procedures* to issue an order or an amendment to the appropriate tariff having the effect of Service Order 1134 (Appendix B - Page 21 - Jurisdictional Statement).

The issue is whether the extraordinary power granted to the appellant in 49 U.S.C. 1(15) can be used to provide the remedies the appellant seeks to invoke under Order 1134 without any notice, hearing or opportunity by the appellees or persons in their business to give the Interstate Commerce Commission the benefit of their knowledge of the lumber business and the problems involved. The opinion of the court below which analyzes the legislative history of the statute in question as well as the administrative practices of the appellant over the past 56 years that the statute has been in existence demonstrates clearly that the appellant does not have the power it claims under 49 U.S.C. 1(15). It is also apparent that the appellant never previously believed that it had the power it attempted to invoke in this case.

The appellant admits that the boxcar shortage has existed for more than fifty years and the undisputed evidence is that the marketing practices of the appellees have existed for more than 33 years (See Affi-

davit of A. M. Cheatham - p. 4, ll. 12-32). Although the appellant has admitted that it has issued hundreds of car service orders for the purpose of dealing with the boxcar shortage, it never purported to exercise the power it arrogates to itself under car service order 1134 (Paragraphs 6, 7, pp. 7-8, Stipulation of Facts).

In view of the legislative history of the statute in question, the undisputed testimony of the appellees and the admissions of the appellant it would appear that the present contentions of the appellant are unsubstantial as being contradicted by the legislative history of 49 U.S.C. 1(15) and its administrative history as construed by the appellant and this Court should affirm the Judgment on the basis of the opinion of the court below.

MOTION II

49 U.S.C. 1(15) under which the appellant purported to act in this case applies only to "emergencies." The facts in the record demonstrate clearly that there was no emergency as contemplated by the statute.

ARGUMENT

The appellant claims that Service Order 1134 is a car service order which it had authority to issue under 49 U.S.C. 1(15). The court below held that it was not. The court held it was in effect an amendment to the tariff, passing as a car service order and the label given the action of the appellant was a mask to attempt to legitimatize an action designed to by-pass

normal due process procedures. The appellees urge that this is the correct view of the situation. Even if it is not, the appellees contend the appellant exceeded its powers and the order should be set aside for that reason.

The entire statutory scheme of the Interstate Commerce Act and its statutory history makes it clear that "non-emergency" problems can only be dealt with by the appellant after appropriate hearings, notice, opportunity to be heard, judicial review and all of the other safeguards which normal administrative procedures have given affected parties.

There are two sections of the Interstate Commerce Act authorizing the appellant to issue car service orders. 49 U.S.C. 1(14) provides for all of the above normal administrative procedures, which admittedly were not used in this case. 49 U.S.C. 1(15), under which the appellant purported to act in this case, eliminates such safeguards in "emergency" cases because of what was felt to be the overriding public necessity in such cases. (See House Report 18, 65th Congress, First Session) Therefore, the threshold question to be decided in this case is whether the appellant properly acted under the "emergency" section of the Interstate Commerce Act (49 U.S.C. 1(15)). Obviously merely calling a situation an emergency does not make it so. The use of the word "emergency" is subject to the same abuses as the invocation of other similar catch phrases and this Court must have the ultimate right to determine whether the jurisdictional

facts as shown in the record are present which would authorize the appellant to exercise its "emergency" powers.

The admission of facts in the record of this case (pp. 6-7, Stipulation of Facts) and the undisputed evidence (Affidavit of A. M. Cheatham - p. 4, ll. 12-32) shows that the condition the appellant is attempting to deal with has existed for over fifty years and the industry practices have been in existence for over 33 years. It would appear that a condition which has existed for over fifty years, which has been the subject of hundreds of actions by the appellant, can hardly be called an emergency which justifies ad hoc, ex parte, helter-skelter actions attempting to deal with the problems. If the actions of the lumber industry have had a material effect on the boxcar shortage, the time is long past when the appellant should have invoked the provisions of 49 U.S.C. 1(14) and have dealt with the subject on a long range basis, taking into account the interests of all of the parties involved by having appropriate hearings and giving all parties an opportunity to be heard. At the same time the Interstate Commerce Commission would benefit from the knowledge of witnesses concerning industry practices and economics which even the Interstate Commerce Commission, in its infinite wisdom, might not have available to it. This is what Congress intended when it passed the two sections in question.

This Court has never passed upon the question of whether the mere opinion of the Interstate Commerce

Commission that an "emergency" exists justifying the use of 49 U.S.C. 1(15) precludes any judicial examination of the jurisdictional facts upon which the Interstate Commerce Commission purports to act. It is true that a District Court in *Daugherty Lumber Co.* v. *U. S.*, 141 F. Supp. 576 seems to preclude such a threshold examination except when there is proof of "fraud, wrongdoing or capriciousness", and the language of the Court in *U. S.* v. *Southern Railway Company*, 364 F.2d 86 appears to follow this reasoning. It is submitted by the appellees, however, that such a standard is much too restrictive to determine whether an administrative agency has authority to decide its own jurisdiction in the first place.

The opinion of District Court Judge Hemphill, in *U. S.* v. *Southern Railway Company*, 250 F. Supp. 759, particularly at pp. 762-765, would appear to be a much more accurate statement of the law and be more in keeping with our traditions of judicial review and the limitation of administrative power. The scholarly analysis by Judge Hemphill of 49 U.S.C. 1(15) in the *Southern Railway* case, supra, should be so convincing to this Court that it should hold that the usual rules of "jurisdictional facts" should apply with respect to 49 U.S.C. 1(15). To paraphrase Judge Hemphill, 250 F. Supp. 764:

> "The net effect of what happened is that the Commission is attempting to treat a continuous chronic problem which has existed . . . 'for over 50 years' . . . as an emergency requiring immediate action."

Referring to the emergency powers granted to the Commission by 49 U.S.C. 1(15), Judge Hemphill further stated, *U. S.* v. *Southern Railway Company*, supra, 250 F. Supp. 759 at 764:

> "Nowhere in the voluminous legislative history is there any suggestion that this authority could be exercised in lieu of the regular rulemaking authority given by Section 1(14)."

To paraphrase Judge Hemphill again, 250 F. Supp. 764:

> "It is obvious that Service Order No. . . . 1134 . . . as amended, sought to deal with a chronic problem, not an emergency."

The decision of the U. S. Court of Appeals, Fourth Circuit, in *U. S.* v. *Southern Railway Company*, 380 F.2d 49, reversing Judge Hemphill does not impair the authority of his statements relating to the subject matter discussed herein because the case was decided in the Court of Appeals on an entirely different ground not relevant to this case.

At any time during the last 33 years when the practices of the appellees have been admittedly in existence, the appellant could have undertaken to follow the procedures authorized in 49 U.S.C. 1(14). It could have conducted an inquiry and commenced a proceeding for the purpose of preventing what it claims to be the harmful practices employed by the appellees and persons in similar business.

Of course, if the appellant did so, it would be required to hear testimony, make findings and be sub-

ject to judicial review. This is one thing the appellant has at all costs attempted to avoid by invoking the magic word "emergency", and issuing ex parte orders subject to no review and without the benefit of any input from the industries involved. This is what this case is all about!

CONCLUSION

This Court should not countenance such procedures any longer. It should affirm the judgment of the court below, both on the basis of the opinion of the court below and on the ground that the appellant, on the face of the record, has exceeded the powers granted to it under 49 U.S.C. 1(15) because there is no showing of an emergency in any rational sense of the word.

Respectfully submitted,

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